Office-Supreme Court, U.S.
FILED
APR 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-5889

In the Supreme Court of the United States
OCTOBER TERM, 1980

JOHN SANTOSKY II AND ANNIE SANTOSKY,
PETITIONERS,

v.

BERNHARDT S. KRAMER, COMMISSIONER,
ULSTER COUNTY DEPARTMENT OF
SOCIAL SERVICES, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

JOINT APPENDIX

H. RANDALL BIXLER
Hudson, Creyke, Koehler, Tacke & Bixler

STEPHEN D. SCAVUZZO,
Of Counsel
1744 R. Street, N.W.
Washington D.C. 20009
(202) 483-2500

EDWARD E. STROHSAHL
110 Market Street
Saugerties, New York 12477
(914) 246-4951
Counsel for Respondent

MARTIN GUGGENHEIM
Washington Square Legal Services, Inc.
Suite 1501
80 Fifth Avenue
New York, New York 10011
(212) 924-3200

ALAN N. SUSSMAN
Ricken, Goldman, Sussman & Blythe
Kingston, New York
(914) 339-3050
Counsel for Petitioners

PETITION FOR CERTIORARI FILED DECEMBER 13, 1980.
CERTIORARI GRANTED MARCH 23, 1981.

INDEX

	Page
Chronological List of Revelant Docket Entries	1
Family Court Petitions for Commitment of Guardianship and Custody—Permanent Neglect	2
Notice to Attorney General	8
Petitioner's Exhibit No. 1, Family Court	9
Petitioner's Exhibit No. 2, Family Court	10
Petitioner's Exhibit No. 3, Family Court	12
Petitioner's Exhibit No. 4, Family Court	14
Petitioner's Exhibit No. 5, Family Court	16
Decision of Fact-Finding—Family Court	19
Decision of Disposition—Family Court	39
Order of Family Court Disposition—Tina Frances Apel	41
Order of Family Court Disposition—John Santosky III	43
Order of Family Court Disposition—Jed Conrad Santosky	45
Notice of Appeal to Court of Appeals From Family Court	47
Order Staying Enforcement, Family Court	48
Order by Court of Appeals Transferring Appeal to Appellate Division	50
Decision of Appellate Division, Third Department	51
Order of Appellate Division, Third Department	52
Notice of Appeal to Court of Appeals From Appellate Division, Third Department	54
Order of Court of Appeals Dismissing Appeal	55
Order of United States Supreme Court Granting Motion to Proceed In Forma Pauperis and Granting Writ of Certiorari	56

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Petitions for Commitment of Guardianship and Custody—Permanent Neglect Filed in Family Court on October 16, 1978.

Fact-finding Hearing Held in Family Court on January 23, 26, 31 and February 1, 1979.

Decision of Fact-finding by Family Court Rendered on March 12, 1979.

Decision of Disposition by Family Court Rendered on April 5, 1979.

Final Order Terminating Parental Rights as to the Three Children Entered in Family Court on April 5, 1979.

Notice of Appeal to Court of Appeals from Family Court Order Filed on April 24, 1979.

Stay of Enforcement of Family Court Order Entered in Family Court on May 18, 1979.

Order of Court of Appeals Transferring Case to Appellate Division, Third Department Entered in June 14, 1979.

Decision of Appellate Division, Third Department Affirming Orders of Family Court Rendered on May 1, 1980.

Order of Appellate Division, Third Department Affirming Orders of Family Court Entered on May 17, 1980.

Notice of Appeal to Court of Appeals from Order of Appellate Division, Third Department Filed on May 20, 1980.

Order of Court of Appeals Dismissing Appeal Entered on September 16, 1980.

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

(Commitment of Guardianship and Custody—
Permanent Neglect) 5/77

Docket No. B-375-78

In the Matter of the Commitment of Guardianship and Custody pursuant to §384-b of the Social Services Law of TINA FRANCES APEL, JOHN SANTOSKY III, and JED CONRAD SANTOSKY Children under the Age of Eighteen Years Alleged to be Permanently Neglected Children

PETITION

TO THE FAMILY COURT:

The undersigned Petitioner respectfully shows that:

1. Petitioner(s) Bernhardt S. Kramer, Commissioner (is) (an authorized agency) having (its office and place of business) at 240 Fair Street, Kingston, in the County of Ulster, State of New York.

2. Tina Frances Apel is a (fe)male child under the age of eighteen years, born on August 15, 1971 at Kingston, New York who now resides in the County of Ulster, State of New York. (*SEE ATTACHED SHEET*)

3. The full name and the address of each parent and custodian of said children are:

Name	*Last Known Address*
ANNIE APEL SANTOSKY (Tina, John and Jed)	P.O. Box 228, Accord, NY
JOHN SANTOSKY II (John and Jed)	P.O. Box 228, Accord, NY

4. The name and the address of each other interested party who should be afforded notice of this proceeding are:

Name	*Last Known Address*

There are no persons other than those listed above entitled to notice pursuant to Sections 384-b and 384-c of the Social Services Law.

5. Said children came into the care of Bernhardt S. Kramer, Commissioner of Social Services, an authorized agency, under the following circumstances: Tina Frances Apel was temporarily placed in the custody of the petitioner on October 10, 1973. She was adjudicated a Neglected child on November 26, 1973, and placed in the care and custody of the Petitioner. The Order of Placement has been extended on several occasions and she is presently in the custody of the petitioner. (SEE ATTACHED SHEET)

6. (S)aid authorized agency has made diligent efforts to encourage and strengthen the parental relationship in that (SEE ATTACHED SHEET)

(Specify the efforts made or the reasons such efforts would be detrimental to the best interests of the child.)

7. (N)otwithstanding such efforts), the (parent(s)) (have) failed for a period of more than one year following the date the children came into the care of Petitioner, an authorized agency, substantially and continuously or repeatedly to maintain contact with or plan for the future of each child although physically and financially able to do so.

8. The best interests of said child require the commitment of the guardianship and custody of each child to Petitioner, (an authorized agency) for the following reasons:

(if appropriate, include facts regarding a non-respondent parent)

(SEE ATTACHED SHEET)

9. No previous petition has been filed for the relief sought herein (except petitions alleging Permanent Neglect were filed on September 8, 1976, followed by a trial on November 16–18, 1976, and an Order of Dismissal on February 22, 1977. The grounds for the present petition have arisen subsequent to the earlier action.

WHEREFORE, your Petitioner prays for an order adjudicating the above-named children a permanently neglected children and committing such guardianship and custody of the children to Petitioner, (an authorized agency),

and for such other and further relief as in the interests of child may be granted.

Dated: October 16, 1978

Ulster County Department of Social Services
(Agency)
(by

/s/BERNHARDT S. KRAMER
Commissioner

VERIFICATION

STATE OF NEW YORK

: ss.:

COUNTY OF ULSTER

being duly sworn, says that (s)he is the Petitioner in the above-named proceeding and that the foregoing Petition is true to (his) (her) own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters (s)he believes it to be true.

BERNHARDT S. KRAMER
Petitioner

Sworn to before me this
16th day of October, 1978.

/s/ _____
BURTON GULNICK
(Deputy) Clerk of the Court
Notary Public

In the Matter of

TINA FRANCES APEL, JOHN SANTOSKY III, and JED CONRAD SANTOSKY

Children under the Age of Eighteen Years
Alleged to be Permanently Neglected children

2. (continued)

John Santosky III is a male child under the age of eighteen years, born on August 22, 1973, at Kingston, NY, who now resides in the County of Ulster, Statre of New York.

Jed Conrad Santosky is a male child under the age of eighteen years born on August 19, 1974 at Kingston, NY, who now resides in the County of Ulster, State of New York.

5. (continued)

John Santosky III was temporarily placed in the custody of petitioner on August 19, 1974. He was adjudicated a Neglected child on September 30, 1974, and placed in the custo-

5. (continued)

dy of petitioner. The Order of Placement has been extended on several occasions and he is presently in the custody of petitioner.

Jed Conrad Santosky was temporarily placed in the custody of petitioner on August 22, 1974. He was adjudicated a Neglected Child on September 30, 1974, and placed in the custody of petitioner. The Order of Placement has been extended on several occasions and he is presently in the custody of petitioner.

6. (continued)

(a) The petitioner arranged to bring the children to the Santosky's for visits with the respondents on an average of twice a month.

(b) The petitioner encouraged the respondent, Annie Santosky to attend the Child Enrichment Program offered by Family Service Center to mothers with pre-school children, and which program included the use of a parent aid. Transportation to the program was also offered.

(c) The petitioner arranged for and paid for psychological evaluations of both respondents, and a complete neurological evaluation of respondent, John Santosky, at St. Frances Clinic, Poughkeepsie. Transportation was also provided.

(d) The petitioner offered follow-up psychiatric and psychological services to both respondents at Southern Ulster Mental Health Center.

(e) The Petitioner arranged for counselling sessions for respondents with Elizabeth Smith of Family Service Center.

(f) The petitioner offered birth control counseling at Planned Parenthood.

(g) The petitioner offered vocational training to the Respondent, John Santosky through the Office of Vocational Rehabilitation.

(h) The petitioner offered educational assistance to Respondent, John Santosky at the Adult Learning Center.

(i) The petitioner has provided nutrition aid services to respondent Annie Santosky since November 1977.

6. (continued)

(j) The petitioner offered Homemaker Service to help the respondents immediately prior to and after the birth of the recent infant in June, 1978.

(k) The petitioner has provided Public Assistance, Food Stamps and Medicaid to the respondents. The total value of all services offered to the respondents since November 1976 exceeds $16,000.

8. (continued)

1. Respondents cannot or will not provide a normal family home for the children.

2. Each of the children has been in foster care for a continuous period in excess of four years and continued foster care is not an appropriate plan.

3. Professional psychiatric consultants have evaluated the children and have advised that a permanent alternative home should be sought for the children.

FAMILY COURT: STATE OF NEW YORK
COUNTY OF ULSTER

IN THE MATTER OF

TINA FRANCES APEL
JOHN SANTOSKY, III
JED CONRAD SANTOSKY

children Alleged to be Permanently Neglected Under Section 384-b of the Social Services Law.

NOTICE TO ATTORNEY GENERAL

TO THE ATTORNEY GENERAL OF
THE STATE OF NEW YORK:

SIR:

PLEASE TAKE NOTICE that pursuant to Executive Law, Section 71, John Santosky & Annie Santosky, Respondents in the above entitled action, intend to assert on the hearing of the above-captioned matter that the Family Court Act and Social Services Law of New York are unconstitutional, on the grounds that they require a standard of proof based on a preponderance of the evidence rather than upon clear and convincing evidence, in violation of the Due Process Clauses of Article I, Section 6 of the New York Constitution and Amendment 14 of the United States Constitution.

Yours, etc.

RICKEN, GOLDMAN, SUSSMAN & BLYTHE
Attorneys for Respondents
14 Pearl Street
Kingston, New York 12401
Tel. No. (914) 339-3050

FAMILY COURT—ULSTER COUNTY

PETITIONER'S EXHIBIT 1 FOR IDENTIFICATION
ULSTER COUNTY FAMILY COURT
ACCEPTED IN EVIDENCE

Case Name: Santosky, John and Annie

The following is an accounting of assistance granted from 12/1/76 to 9/30/78:

Public Assistance	$9,120.00
Medicaid	2,633.72
Nutrition Aide	150.00
Counseling Service	300.00
Child Welfare Caseworker Counseling	3,135.00
	$15,338.72

FAMILY COURT—ULSTER COUNTY

PETITIONERS EXHIBIT 2 FOR IDENTIFICATION
ULSTER COUNTY FAMILY COURT
ACCEPTED IN EVIDENCE

January 16, 1979

Bernhardt. S. Kramer
Commissioner of Social Services
Ulster County Dept. of Social Services
County Office Building
Kingston, New York 12401

RE: SANTOSKY, JOHN III
BORN: 8/23/73
C.A. 5–3
Tested: 11/20/78

Dear Commissioner Kramer:

John was again evaluated by the psychologist and psychiatrist. Current Stanford Binet (M.A. of 6–0; I.Q. of 116) is in keeping with former results.

John's behavior is more stable and comfortable and self assured. He is less defensive and more direct in his responses. As a consequence, we feel that John is going to become more direct and probably more rebellious toward pressure. The projectives also suggests the developmentally usual feelings of guilt where John tends to blame himself for almost anything and consequently focuses on attempts to avoid blame—but in his need for self assertion and "independence" can easily get into minor difficulties. It is interesting to note that John's need for "independence" is really an attempt to inure himself from closeness to people since he perceives adults as hurtful. "He don't like his real mother and father. Sometimes he don't want to live no where. He make his own house."

Since we have evaluated both Tina and John the same day, we are most impressed with similarity of their development. Both are moving toward an "intellectual" solution where feelings of closeness and trust in adults are seen as dangerous and to be avoided. The way things are developing

unless there is a definite decision with a built-in program of helping parents understand and cope with these children, we anticipate future developmental difficulties. These are both, for their ages, oversophisticated children who are learning how to manipulate others so as to survive and consequently, are going to require rather sophisticated understanding if we are to help modify their patterns into a more comfortable type of adoption.

Sincerely,

/s/ _____

LENORE M. SPORTSMAN, M.D.
Director

FAMILY COURT—ULSTER COUNTY

PETITIONERS EXHIBIT 3 FOR IDENTIFICATION
ULSTER COUNTY FAMILY COURT
ACCEPTED IN EVIDENCE

January 16, 1979

Commissioner Benhardt S. Kramer
Ulster County Dept. of Social Services
County Office Building
Kingston, New York 12401

RE: APEL, TINA
BORN: 8/15/71
C.A. 7–3
Tested: 11/20/78

Dear Commissioner Kramer:

We have been involved in following Tina's progress and continuing to evaluate her for the past few years. As you know, she is a bright girl (Stanford Binet I.Q. of 120, Raven's I.Q. the same) who we felt was reacting to the uncertainty of her situation. She had identified the natural parents as "hurting parents" and clearly symbolized her feelings of being caught in-between natural parents and foster parents. We suggested that she was moving toward a neurotic resolution of her problem. Current psychological and psychiatric evaluation now indicates a masked abatement of anxiety and a much more comfortable adjustment since Tina has really resolved the problem for herself. She has come to the decision that she would no longer feel guilty over not wanting to return to her natural parents. This is a clearcut psychological decision and as such acts as a powerful protective force that her natural parents are no longer given, by Tina, the power to affect her significantly. Now she will probably manipulate them, more as objects than as people. She is very clear in indicating that "she won't listen" to her natural parents. I suspect that, to a degree, this will also carry over onto her foster parents. Nor do we feel that any psychological intervention will change things for Tina as long as there is no resolution to her current situation. Thus, we anticipate

that Tina's neurotic resolution will become more fixed as time goes on and that the consequence is for Tina to continue to strengthen her resolution not to allow herself to become emotionally close to people. This need to defend herself against anticipated emotional hurt is a neurotic element that will most certainly detract from her future happiness and/or her future capacity to provide optimal mothering—if and when she becomes a mother. Ideally, this child should be released for adoption with provisions for adoptive parents to be worked with so as to break into Tina's movement away from closeness.

Sincerely,

/s/_____

LENORE M. SPORTSMAN, M.D.
Director

FAMILY COURT—ULSTER COUNTY

PETITIONERS EXHIBIT 4 FOR IDENTIFICATION
ULSTER COUNTY FAMILY COURT
ACCEPTED IN EVIDENCE

January 16, 1979

Commissioner Bernhardt S. Kramer
Ulster County Dept. of Social Services
County Office Building
Kingston, New York 12401

RE: SANTOSKY, JED
BORN: 8/19/74
C.A. 4–3

Dear Commissioner Kramer:

Jed was currently evaluated at our Agency on November 11, 1978. He has been evaluated a number of times previously so that we could continue working with his social worker and foster parents in order to maintain his emotional health as he progressed through the various developmental stages.

Jed is a beautiful child with startling blond hair and blue eyes. He separated easily and related appropriately. Former I.Q. on the Stanford Binet was 123 while current results indicated a M.A. of 5–11; I.Q. 138. Obviously, we have a precocious child. Since he is so bright, we also note that he is now in the so called "oedipal" stage. This is reflected in his oversensitivity to guilt since it is a stage where children tend to blame themselves for most problems and, consequently, take the defensive position of "I didn't do it" or "I don't know" even though one is not criticizing them. Thus, we would expect Jed to be more sensitive and more easily hurt currently.

Jed clearly identifies "Sandy and Jack" as his real mother and father. When I asked who "Anne" was he responded, "Foster mother", but had no idea what a foster mother is. There is no question but that "Sandy and Jack" (his foster parents) are perceived psychologically and overtly, as his parents and that separation from them would have serious emotional consequences. We also feel that Jed's current sensitivity and the related anxiety is in major part related to

rise in anxiety experienced by the foster parents because the case is reopened and again going to the court for a decision. We again suggest that any questions Jed might raise concerning relationships be answered factually and that no special attempts be made to fill him in on the details of his background and/or the current state of affairs, unless he asks directly, since the situation is still unresolved and trying to "educate" him will only serve to confuse Jed.

If we may be of further service, please feel free to contact us.

Sincerely yours

/s/ _____

LENORE M. SPORTSMAN, M.D.
Director

FAMILY COURT—ULSTER COUNTY

PETITIONERS EXHIBIT 5 FOR IDENTIFICATION
ULSTER COUNTY FAMILY COURT
ACCEPTED IN EVIDENCE

STATE OF NEW YORK

ss.:

COUNTY OF ULSTER

ELIZABETH SMITH, being duly sworn, deposes and says:

I am director of the Family Service Center of the Children's Home, and I hold the degree of Master of Social Work.

Since March 22, 1976 I have met with and counselled John Santosky and Annie Santosky on a more or less regular basis. From November 29, 1976 to May 22, 1978 I met with and counselled Mr. and Mrs. Santosky on 28 occasions.

At a hearing in the matter concerning the alleged permanent neglect of Tina Apel, Jed Santosky, and John Santosky, III conducted in November, 1976 I testified that Mr. and Mrs. Santosky were not then ready to accept the immediate return of the three children. Mr. and Mrs. Santosky are the parents of a fourth child, James, who resides with them at their home. At that time, I recommended the gradual return of the children one at a time. This was not done.

Since my last giving testimony in this matter Annie Santosky has given birth to a fifth child. This child was born on June 9, 1978.

Since the hearing in November, 1976 I continued to be involved with the Santoskys, and they did some good things in the areas of physical health care for James and educational training for Mr. Santosky. I was concerned about the restrictive nature of their care of James but was unable to effect this. Only the intervention of the Child Protective worker and the Public Health nurse created sufficient pressure so that James was permitted to be out of the playpen and more mobile. Thus, he has within the last six months

begun to accomplish developmental motor tasks appropriate to his age. He does not, however, have the language capability I would expect of a child of two and a half years.

As a means of helping James to learn and helping Mrs. Santosky to recognize his needs and to encourage his development, I strongly recommended their membership in the Children's Enrichment Program—a program specifically designed to deal with the problems of parent-child relationships and the growth and development of children. However, Mr. and Mrs. Santosky refused to permit such participation fearing that someone would abduct James when Mrs. Santosky was occupied in a different area. These fears and lack of trust which are unreasonable and unrealistic make it impossible for the Santoskys to utilize community services which afford the potential of significant benefits for the family, and specifically for James, and for which there are no compensating resources at home. Thus, James still seems subject to many restrictions the effect of which will be inadequate completion of developmental tasks. This preoccupation with themselves and their apprehensions creates an inability to perceive their child as needful of their active reaching out to seek new and expanding experiences for him. At times this seems to me like neglect.

As we again face the necessity of considering the situation of the three Santosky children in care, I see four major factors that need to be considered:

1. The Santoskys' passivity in seeking and participating in activities intended to be helpful to them (In the main, I see them only if I am able to go to their home as they have made numerous excuses as to why they could not keep appointments at my office);
2. The Santoskys' restrictive parenting practices which inhibit normal development in their child;
3. The Santoskys' fears which preclude participation in activities outside their own family group.
4. The recent birth of a fifth child which adds to the demands made upon both Mr. and Mrs. Santosky.

The foregoing factors provide contraindication to the return of any of the children to the Santosky home within the foreseeable future.

/s/_____
ELIZABETH SMITH

Sworn to before me this 7th day of July, 1978

/s/_____
BURTON GULNICK
Notary Public

STATE OF NEW YORK FAMILY COURT: ULSTER COUNTY

Docket Nos. B-3-4-5-78.

In the Matter of the Commitment of Guardianship and Custody pursuant to § 384-b of the Social Services Law of TINA FRANCES APEL, JOHN SANTOSKY III, and JED CONRAD SANTOSKY, children under the age of Eighteen Years alleged to be Permanently Neglected Children.

January 26, 31, February 1, 1979

RICHARD W. GRIGGS, Attorney for Commissioner of Social Services.

ALAN SUSSMAN, Attorney for Respondents.

MARRIN & SMYTH, (WILFRID E. MARRIN, of Counsel), Attorneys for Foster Parents.

JAY SAMOFF, Law guardian.

HUGH R. ELWYN, J: This case represents a second attempt[1] by the Commissioner of Social Services of Ulster County to terminate permanently the parental rights of John and Annie Santosky by reason of the permanent neglect of their three children. (Family Court Act, Art. 6). Each of these three children have been previously adjudicated to be neglected children within the meaning of Article 10 of the Family Court Act and placed with the Commissioner of Social Services for an initial period of 18 months, subject to the further order of the court. Tina Frances Apel, now age 7, has been in foster home placement since November 20, 1973; John Santosky, now age 5, since September 30, 1974 and Jed Conrad Santosky, now age 4, since September 30, 1974. The placement of these three children has twice been extended (Family Court Act § 1055), the

[1] For the result of the first attempt see Matter of Santosky, 89 Misc. 2d 730, affd., 63 AD2d 750.

latest extension being on June 14, 1977, and a third application for an extension of placement filed June 13, 1978 is currently pending with this proceeding. The Court takes judicial notice of its own records that relate to the proceeding before it (Matter of Denlow, 87 Misc. 2nd 410, 411–412 and cases there cited).

This proceeding instituted pursuant to Section 384–b of the Social Services Law (L. 1976, c 666, effective January 1, 1977)[2] was initiated by the filing of a petition on October 16, 1978 pursuant to subd. 4(d) of that law and Article 6 of the Family Court Act. The Petition contains all of the necessary allegations required by Section 614 of the Family Court Act.

Although the petition alleges, after detailing the agency's diligent efforts to encourage and strengthen the parental relationship, that "notwithstanding such efforts, the parents have failed for a period of more than one year following the date the children came into the care of the petitioner, an authorized agency, substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so" (F.C.A. § 614, subd. 1 (d), it was not contended nor was any proof offered at the trial that the parents had failed to maintain contact with their children. On the contrary it is conceded they have through their counsel, diligently sought to have permitted to them such contact through supervised visits as the agency would allow. At one point in these proceedings the Agency, upon advice of their expert consultant in child psychiatry, sought to curtail altogether the parents' contact with their children in foster care upon the ground that such visitation was confusing and even detrimental to the children's emotional well being. The parents' right to maintain contact with their children through periodic visitation was restored only through the intervention of the court.[3]

[2]This statute had been enacted, but was not effective at the time of the earlier trial in this case which occurred in November 1976.

[3]See written, but unpublished, decision of this court, dated June 27, 1977, pp. 10–14. Appendix A.

However, the proof in this case shows that on some sixteen occasions when visits with their children were scheduled the father was from twenty minutes to an hour late and on one occasion when fire engines passed the house found them momentarily more demanding of his time and attention. In any event, such visits as did take place between the parents and their children were at best superficial and devoid of any real emotional content, and were probably wholly meaningless from the standpoint of the children who have come to view their real parents as strangers and their meeting with them as something only to be endured. From the caseworker's description of the infrequent visits that have occurred the court finds such visits to have been "of such character as to overtly demonstrate a lack of affection and concerned parenthood" (Social Services Law, § 384-b, subd. 7 (b). Such visits "shall not be deemed a substantial contact". (Social Services Law, § 384-b subd. 7(b). Moreover, it is noted that the same subdivision of section 384-b of the Social Services Law declares that: "(F)or the purposes of paragraph (a) of this subdivision, evidence of insubstantial or infrequent contacts by a parent with his or her child shall not of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child." Consequently, the court could, even though the point is not seriously urged by the Commissioner, find the children to be permanently neglected, on that ground alone (Matter of Orlando, 40 N.Y. 2d 103).

The Commissioner has elected, however, as in the first case, to predicate his contention that the children have been permanently neglected solely upon the parents' "failure to plan for the future of their children" (F.C.A. §§ 611, 614, subd. 1, (d)) "The statute * * * is stated in the disjunctive and, thus, even though parents may maintain contact with their children the failure to plan for the future of the children, in and of itself, suffices to support a determination of permanent neglect (Matter of Orlando F., 40 N.Y. 2d 103; Matter of Amos HH, 59 AD2d 795)". (Matter of Leon "RR", ___AD2d ___, 3rd Dept., January 25, 1979). The Commissioner has, quite wisely I believe, eschewed any temptation to predicate this case upon the theory that

there has evolved from Bennett v. Jeffreys, 40 N.Y. 2d 543 a non-statutory, nonfault basis for the permanent termination of parental rights. Even though this case is predicated upon and is decided on statutory grounds (Social Services Law 384-b and F.C.A. Art. 6), the non-statutory—no-fault concept as a basis for the permanent termination of parental rights has had such an appealing fascination for some courts that it deserves some discussion here, lest this insidious and pernicious doctrine of questionable constitutional validity find further lodgment in the law.

THE NON-STATUTORY, NO-FAULT CONCEPT.

Although Matter of Bennett v. Jeffreys, 40 N.Y. 2d 543 did not "involve an attempted permanent termination of custody (Family Court §614, subd 1; §631; Matter of Anonymous (St. Christopher's Home), 40 N.Y. 2d 96; Matter of Orlando F., 40 N.Y. 2d 103; Matter of Ray A.M., 37 N.Y. 2d 619)" some courts have found in the "extraordinary circumstances" rule of *Bennett*, particularly where there has been a "protracted separation" of parent and child and "the psychological trauma of removal is grave enough to threaten destruction of the child," a new non-statutory, no-fault ground for termination of parental rights. Since the Court of Appeals in *Bennett* did not expressly create such a new ground for termination of parental rights and was indeed careful to state with care and specificity the circumstances under which intervention by the State in the right and responsibility of a natural parent to custody of a child would be warranted (p. 549), the source of this novel predicate for the exercise of the power of the State can only be traced to the command of the same court in Matter of Sanjivini K., 40 N.Y. 2d 1025, 1026, to resolve "the status of the child and the rights and obligations of the parties in that permanent neglect proceeding in conformity with the standards we have enunciated (Matter of Bennett v. Jeffreys, 40 N.Y. 2d 543)."

Instead of limiting the command of the court to the dispositional phase of a proceeding for the permanent termination of parental rights (Family Court Act, Art. 6) where by

statute "the best interests of the child" is the focus and thrust of the proceeding (Family Court Act §§623, 614, subd. 1 (6)), the courts have found in *Bennett* a new non-statutory, no-fault ground for terminating parental rights (See Matter of Sanjivini K., 63 AD 2d 1021). This newly invented concept of "de facto permanent neglect" did not, however, go completely unchallenged, but was in fact severely criticized by the two dissenting justices as a concept for which there was no statutory authority or decisional precedent—one not sanctioned by anything in Bennett v. Jeffreys (See dissent pp. 1021–1031).[4]

A number of other appellate courts have by their holdings likewise seemingly sanctioned the creation of this new and independent non-statutory, no-fault ground for the termination of parental rights (See, Matter of Abbott House v. Barbara J., 55 AD2d 604; Matter of Leticia Rose M., 54 AD2d 909; Matter of Kim Marie J., 59 AD2d 716; Matter of Jean Yvette E., 59 AD2d 907; Matter of Jonathan D., Jewish Child Care Assn. v. Danielle F.D., 62 AD2d 947).[5]

It remained, however, for the judges of the Family Court to come forth with a clear and unequivocal articulation of the new concept of a non-statutory, no-fault ground for the termination of parental rights. The first to do so was Judge DONOVAN of Westchester County in Matter of Amy S., 89 Misc. 2d 42, 49–50, followed by Judge GARTENSTEIN of New York County in Matter of Suzanne Y., 92 Misc. 2d

---

[4]Matter of Sanjivini K., 63 AD2d 1021 is on appeal to the Court of Appeals. The case should provide final clarification of the "best interests" test of Bennett v. Jeffreys to statutory termination proceedings.

[5]The Appellate Division affirmed an order dismissing a permanent neglect petition, but modified it by directing the court to hold a dispositional hearing on the issue of the best interest of the child. Pursuant to that direction the Family Court held a hearing and continued foster care. However, the Family Court, recognizing the unsatisfactory state of the case law in this area urged the Court of Appeals to rule on the applicability of *Bennett*, 40 N.Y. 2d 543 to cases involving Agencies and the termination of parental rights (Matter of Jonathan D., Fam. Ct., New York Co., N.Y.L.J. Feb. 9, 1979, p. 6, c. 3).

652, 658–661,[6] Judge MILLER of Rockland County in Matter of Strausberg, 92 Misc. 2d 620, 624 and Judge FOLLETT of St. Lawrence County in Matter of Andress, 93 Misc. 399, 402–403.

Most recently, the Appellate Division (3rd Dept) in Matter of Leon "RR", __AD2d __, has found in Matter of Bennett v. Jeffreys, 40 N.Y. 543 and Matter of Sanjivini K., 40 N.Y. 2d 1025 "a common law standard for termination of parental rights independent of the statutes", citing Matter of Kim Marie J., 59 AD2d 716, and Matter of Suzanne Y., 92 Misc. 2d 652.

All of this, as Judge DONOVAN in Matter of Amy S., supra points out (p. 50), is to embark upon a "path fraught with danger", for the concept opens the lid of a "Pandora's Box" (p. 45). Likewise, Judge GARTENSTEIN in Matter of Suzanne Y., supra 662 was equally uncomfortable with the unpredictability and the potential for abuse and tyranny such a concept provides for social agencies and courts to exercise for the good of its victims.

Moreover, the concept of a non-statutory, no-fault ground for the termination of parental rights, because a court determines that "the best interests" of the child requires it, is fraught with a serious constitutional question.

"In a long line of cases dating back more than 50 years, the Supreme Court has endowed the family with an aura of constitutional protection. In Meyer v. Nebraska, 262 US 390 (1923), the court invalidated a state law which prohibited the teaching of German. It held that the State's 'concern' for children and their best interest—in this case, the protection of children from foreign influences—was insufficient to overcome parents' rights to control their children's upbringing. In the more recent past in Stanley v. Illinois, 405 U.S. 645 (1972), the court invalidated an Illinois statute which automatically deprived non-marital fathers of their

---

[6] Matter of Suzanne Y., 92 Misc. 2d 652 has been reversed by the Appellate Division, First Department, AD2d. The Court unanimously rejected Judge Garenstein's "no fault" theory of termination of parental rights.

children's custody upon the death of their mother. In describing the rights of parents as compared to non-related third parties, the court stated:

> "(We have) frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential', 'basic civil rights of man' and 'rights far more precious than property rights'. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The integrity of the family has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.

"And most recently, in Smith v. Organization of Foster Families, 53 L. Ed. 2d 14 (1977), a case involving the three sided dispute between the state, natural parents and foster parents (see Children's Rights Report, Vol. 1, Nos. 4 & 6), a unanimous Supreme Court held that the right of natural parents to the custody of their children is a 'constitutionally recognized liberty interest that derives from blood relationship, state law sanction, and basic human right.'

"Relying on these and other cases, the Supreme Court has underscored a right which is nowhere clearly mentioned in the constitution but has recently come to be known as the 'right of family integrity'." (Quoted from Children's Rights Report, Vol. III, No. 2, October 2, 1978, p. 2).

In Smith v. Organization of Foster Parents, 431 U.S. 816, 53 L. Ed. 2d 14; 97 S. Ct. 2097 Justice POTTER STEWART in his separate opinion emphasized that the constitution forbids the state from depriving fit parents of their children because it believes it to be in the child's "best interests", or because the child will be happier with someone else. In his opinion in which the Chief Justice and Mr. Justice REHNQUIST concurred he wrote: "One of the liberties protected by the Due Process Clause, the court has held, is the freedom to 'establish a home and bring up

children' Meyer v. Nebraska, supra, at 399, 67 L. Ed. 1042, 43 S. Ct. 625, 29 ALR 1146. If a State were to attempt to force the breakup of a natural family over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the child's best interest, I should have little doubt that the State would have intruded impermissibly on the 'private realm of family life which the state cannot enter' Prince vs. Massachusetts, 321 US 158, 166, 88 L. Ed. 645, 64 S. Ct. 438" (Smith v. Organization of Foster Parents, supra, 53 L. Ed. 14, 46–7).

More recently, the United States Supreme Court clearly raised the warning flag when in Quilloin v. Walcott, ___U.S. 54 L. Ed. 2d 511–519–420, 98 S. Ct. 549, 554–555 it said: "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. (citations.) 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder'. (citation.) And it is now firmly established that 'freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment'. (citation.)

"We have little doubt that the Due Process Clause would be offended '(i)f a State were to attempt to force the breakup of a natural family over the objections of the parents and their children without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest'." (citing Smith v. Organization of Foster Families for Equality and Reform, 431 US 816, ___, 53 L. Ed. 2d 14, 97 S. Ct. 2094 (1977) (Stewart J., concurring).

Likewise, the court of appeals in Bennett v. Jeffreys, 40 N.Y. 543, 548, which is the fountain-head for the development of the no-fault basis for the termination of parental rights and again in Matter of Goldman, 41 N.Y. 2d 894 recognized that in the exercise of the state's power there are constitutional limits to be observed. (See also, Janet G. v.

N.Y. Foundling Hosp. 94 Misc. 2d 133, 141–142). More recently, in Matter of Corey L. v. Martin L., 45 N.Y. 2d 383 the Court of Appeals speaking with respect to the termination of parental rights through adoption said (p. 386): "Despite recent changes in statutory law, there remains a heavy burden of constitutional magnitude on one who would terminate the rights of a natural parent through adoption". The constitutional barrier to the termination of a parent's rights is again emphasized by the court when at p. 389 it says: "Nevertheless, while accepting the change wrought by statutory law, this court has and must continue to respect constitutional limitations on the procedures for termination or deprivation of parental rights (see Matter of Goldman, 41 N.Y. 2d 894, 895, supra; Matter of Bennett v. Jeffreys, 40 N.Y. 2d 543, 548)". And again at p. 392 the court says: "* * *, the statute should not be so broadly applied that it establishes a preference. A termination of parental rights is a drastic event indeed so much so that it raises questions of constitutional dimension" (citing Matter of Goldman and Bennett v. Jeffreys, supra).

Although Matter of Corey L. v. Martin L., supra dealt with the termination of a parent's right by reason of abandonment in the context of an adoption proceeding there is language in the court's opinion which can fairly be said to create some doubt as to whether or not the Appellate Divisions and the Family Courts have not gone too far in finding in Bennett a non-statutory, no fault ground for termination of parental rights all in obeisance to the rubric of the "best interests" of the child. For instance, at p. 389 the court says: ". . . . the ultimate question is whether the submitted proof establishes abandonment as a matter of law", citing Matter of Bistany, 239 N.Y. 19, 24 and Matter of Maxwell, 4 N.Y. 2d 429, 433. Cannot one with equal logic substitute "permanent neglect" for "abandonment"? And again at p. 391 the court says: "Absent consent, the first focus there was on the issue of abandonment since neither decisional rule nor statute can bring the relationship to an end because someone else might rear the child in a more satisfactory fashion. * * * * The best interests of the child, as such, is not an ingredient of that conduct (the par-

ents) and is not involved in the threshold question. While promotion of the best interests of the child is essential to ultimate approval of the adoption application, such interests cannot act as a substitute for a finding of abandonment". Again the question arises, cannot the words "permanent neglect" be substituted for "abandonment"? And finally, the court says (pp. 391–392): "If, for purposes of determining mere custody, the best interests of the child would not permit a parent to be displaced in the absence of extraordinary circumstances, surely a complete termination of obligations and rights is not to be allowed in a situation where, as here, abandonment has not been established, even if an ensuing adoption might be viewed by some to be in the best interests of the child."

The Court of Appeals decision in Corey L. v. Martin L., supra has caused some Family Court Judges to have some second thoughts as to whether the implications thought to have flowed from Bennett have not been too broadly applied (See decision of Judge GARTENSTEIN who "crystalized" the no-fault concept in Matter of Suzanne Y., 92 Misc. 2d 652 in the Second Matter of Suzanne Y., 95 Misc. 2d 733; Matter of Elizabeth Green, Family Ct., Bronx Co., N.Y.L.J. Dec. 12, 1978, p. 12, c. 6; and In re Jonathan D., Family Ct. New York County, N.Y.L.J. Feb. 9, 1979, p. 6, col. 3). Obviously, the last word on the concept of a non-statutory, no fault ground for the permanent termination of parental rights has not yet been written and won't be until the Court of Appeals has occasion to clarify and resolve the issue.[7]

It is not necessary for this court to attempt to resolve the constitutional issue posed by the concept of no-fault termination of parental rights based upon a comparative best interest standard, for the case can be decided on statutory grounds (Social Services Law §384–b and Family Court Act, Art. 6). "Constitutional questions should not be

---

[7]The Court of Appeals may soon have the opportunity to do so, since the decision of the Appellate Division (2nd Dept) in Matter of Sanjivini K., 63 AD2d 1021 is now on appeal to the Court of Appeals.

reached unless their disposition is necessary" (Comiskey v. Arlen, 55 A D 2d 304, 306, affd. 43 N.Y. 2d 696). It is enough to point out the constitutional infirmity in such a concept, leaving its final resolution to an appellate court.

CONSTITUTIONALITY OF QUANTUM OF PROOF.

The respondent has raised a question as to the constitutionality of section 622 of the Family Court Act which permits the court to determine whether the allegations of permanent neglect (paragraphs (a), (b), (c) and (d) of subdivision one of section 614) are supported by a fair preponderance of the evidence. It is contended that to be constitutional the standard of proof must be "beyond a reasonable doubt" or at least "clear and convincing". The Attorney General has been notified that the constitutionality of the statute will be brought into question (Executive Law §71, CPLR §1012 (b), in this court, but he has chosen not to appear.

In response to the constitutional issue the court notes that sections 611 and 614 have been found to prescribe a constitutional standard of poof by the Appellate Division (3rd Dept.) In re Anthony L. "CC", 48 AD2d 415 and by a Family Court in Matter of Orzo, 84 Misc. 2d 482, 490–493.

Moreover, a finding of unconstitutionality should not be lightly undertaken by courts of first instance. "A statute should not ordinarily be set aside as unconstitutional by a court of original jurisdiction unless such decision is inescapable. Courts of first instance should not exercise transcendent power of declaring an act of the Legislature unconstitutional except in rare cases involving life and liberty, and where the invalidity of the Act is apparent on its face". (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 150, and authorities there cited. See, e.g. Comiskey v. Arlen, 55 A D 2d 304, affd. 43 N.Y. 2d 696; Bolling v. Corsi, 204 Misc. 778, 783, affd. 306 N.Y. 315). The tendency is to leave such questions to appellate tribunals (City of New Rochelle v. Echo Bay WaterFront Corp., 182 Misc. 176, 177, affd. 268 A D 2d 182, affd. 294 N.Y. 678). Even intermediate Appellate Courts sometimes defer to higher appel-

late courts (Matter of Excelsior Pictures Corp. v. Regents, 2 A D 2d 941). "There is a strong presumption that a statute duly enacted by the Legislature is constitutional" (People v. Pagnotta, 25 N.Y. 2d 333, 337).

Consequently, the issue of the constitutionality of the statute (F.C.A. § 622) will not be passed upon and the decision here made is predicated upon the standard of proof prescribed by the statute—"a fair preponderance of the evidence".

THE AGENCY'S DILIGENT EFFORTS.

The only real plan for the future of the Santosky children that has ever been formulated by anyone is the plan evolved by the Commissioner of Social Services pursuant to this Court's order of December 31, 1975 (See Matter of Santosky, supra 732).

To implement this plan through "diligent efforts"[8] to encourage and strengthen the parental relationship, the Agency in accordance with court's directive, redoubled its efforts to raise these parents to an acceptable minimal level

---

[8]Section 384-b, subd 7 (f) defines this phase as follows:

"(f) As used in this subdivision, 'diligent efforts' shall mean reasonable attempts by an authorized agency to encourage a meaningful relationship between the parent and the child, including but not limited to:

(1) Consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family.

(2) Making suitable arrangements for the parents to visit the child.

(3) Provision of services and other assistance to the parents so that problems preventing the discharge of the child from care may be resolved or ameliorated.

(4) Informing the parents at appropriate intervals of the child's progress, development and health."

For an elaboration of the need for the Agency to make "diligent efforts" and the consequences of its failure to do so, see Matter of Anita PP, 65 AD2d 18.

of competency as parents (See Matter of Santosky, supra 741).

The Commissioner in his petition alleges and the proof supplied through the testimony of the two case workers in charge of the Santosky case supports a finding that following this court's decision in January 1977 and for the past two years at varying times the Agency has offered and arranged for and encouraged the respondents to accept:

(a) Visits with the children on an average of twice a month, the children being brought to their home.

(b) Attendance by Respondent, Annie Santosky at the Child Enrichment Program offered by the Family Service Center to mothers with pre-school children, which program included the use of a parent aid. Transportation was provided.

(c) Psychological evaluations of both respondents, and a complete neurological evaluation of the Respondent, John Santosky, at St. Francis Clinic, Poughkeepsie. Transportation was also provided.

(d) Follow-up psychiatric and psychological services to both respondents at Southern Ulster Mental Health Center.

(e) Counseling sessions for Respondents with certified social worker, Elizabeth Smith of Family Service Center.

(f) Birth control counseling at Planned Parenthood.

(g) Vocational training to the Respondent, John Santosky through the Office of Vocational Rehabilitation and Gateway Industries.

(h) Education assistance to tth Respondent, John Santosky at the Adult Learning Center.

(i) Nutrition Aid Services to Respondent, Annie Santosky since November 1977.

(j) Homemaker Serrvice to help the Respondents immediately prior to and after the birth of their fourth child in June 1978.

(k) Public Assistance, Food Stamps and Medicaid to the Respondent. The total value of all Social Services offered to the Respondents since November 1976 exceeds $16,000.

"In short," as the court stated in its opinion in Matter of Santosky, supra, 733; "ever since the Santosky children have been in foster home placement, the parents have not only had offered, but diligently urged upon them every social service available in Ulster County which could conceivably have helped the Santoskys in achieving a goal of the eventual reunion of the family".

I am satisfied, therefore, as I was in the earlier case, that the preponderance of the evidence supports a finding that the Ulster County Department of Social Services has indeed made diligent efforts to encourage and strengthen the parental relationship. The observation that it has done so, "albeit with minimal success" cannot, however, be truly said of the Agency's renewed and redoubled efforts. To credit the Agency's efforts with any success this time around is to take a more charitable view of the matter than the evidence warrants, for both case workers who have been so long intimately involved with providing social services to this family testified that in spite of all their efforts they could discern no forward progress whatever; that their progress in parenting ability and skills was nonexistent. At the end, the Santoskys' capacity to function as parents for their children remained as minimal as at the start. Regretfully, the Agency acknowledges that its diligent efforts through the offering of a variety of social services, which met with a response ranging from grudging acceptance to outright hostility has been a failure. Nevertheless, in spite of ample cause for discouragement and ultimate failure the court is satisfied that the requirement of paragraph (c) of subdivision one of Section 614 of the Family Court Act has been amply met by a preponderance of the evidence.

Since the children who are but 7, 5 and 4 years of age are all obviously under 18 years of age and are presently by virtue of orders of this court in the care of the Ulster County Department of Social Services, an authorized Agency, the court finds that the requirements of paragraphs (a) and (b) of subdivision one of Section 614 of the Family Court Act are supported by a preponderance of the evidence. As

in the first trial of this case the critical issue and the one on which the parents right to the continued possession of their children stands or falls, is their alleged failure to plan for the future.

THE PARENTS' FINANCIAL ABILITY TO PLAN.

To sustain an adjudication of permanent termination of parental rights there must be a finding that the parents "failed for a period of more than one year * * * substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so", (F.C.A. §§ 611, 614, subd. 1 (d)).

Because the phrase, although . . . "financially able to do so" could not under well recognized rules for the construction of statutes be rejected as superfluous but had to be given meaning and effect (McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 231), the court in its earlier decision in this case found that because they were the recipients of full public assistance, including food stamps and medicare, that the Santoskys' financial ability was nonexistent. In short, the court found that by reason of their poverty, their failure to plan for the future had to be excused (See Matter of Santosky, 89 Misc. 2d 730). Although the dismissal of the proceeding was affirmed on appeal, this conclusion of the trial court was rejected by the Appellate Division (3rd Dept) which in its decision of affirmance under the name of Matter of John W. and others, 63 AD2d 750 said: "The Court determined, however, that respondents' failure to plan for the future of the children had to be excused by their poverty. It is the opinion of this court that, absent evidence that a parent is receiving an inadequate amount of public assistance, the fact that the parent is receiving public assistance does not automatically excuse that parent from substantially planning for the future of a child. There was no proof in the present case that respondents were receiving inadequate public assistance."

This view of the adequacy of public assistance to provide sufficient financial ability to plan for the future seems to be shared by the Appellate Divisions of both the 1st and 4th

Departments. In Matter of Klug, 32 AD2d 915 the 1st Dept. observed: "So far as financial ability to care for a child is concerned, the court is well aware of the fact that in this city a mother may obtain support to maintain herself and her child." And in Matter of Karas v. Karas, 59 AD2d 1022 the 4th Dept. said: "Respondent contends on appeal that the proof fails to establish by a preponderance of the evidence that she was financially and physically able either to maintain contact with or plan for the future of her children. The assertion of financial ability clearly lacks merit. Although respondent was a recipient of public assistance, she could have made arrangements to visit and communicate with her children."

To rebut any contention that the public assistance furnished to the Santoskys might be inadequate, although no such contention was in fact made, the Commissioner offered proof that from December 1, 1976 to September 30, 1978 the County of Ulster furnished to the Santoskys financial assistance totaling $15,338.72 in the following categories and amounts:

Public Assistance	$ 9,120.000
Medicaid	2,633.72
Nutrition Aide	150.00
Counseling Service	300.00
Child Welfare Caseworker Counseling	3,155.00
TOTAL	$15,338.72

In light of the Appellate Division's decision in this case, Matter of John W. and others, 63 AD2d 750, and the Appellate decisions to which reference has been made the court is constrained to hold that the Santoskys' total dependence on public assistance throughout the history of this litigation furnishes no excuse for their failure to plan for the future of their children so long in foster care.

FAILURE TO PLAN.

This court in its earlier decision in this case (Matter of Santosky, 89 Misc. 2d 730, affd. 63 AD2d 750) reviewed at some length (pp 734–5) the decisional definitions of the

phrase "substantially to plan for the future of the child." Much of what was there said has now been codified by the enactment of Section 384-b of the Social Services Law (L. 1976, c. 666, effective January 1, 1977) where in subd. 7 (c) "to plan for the future of the child" is defined.

Social Services Law § 384-b, subd. 7 (c) now provides:

> "(c) As used in paragraph (2) of this subdivision, 'to plan for the future of the child' shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent".

In contrast to the situation prevailing at the time of the first trial (November 1976) when this court was able to find that "while the Santoskys' plans for the future of their children (were) indeed nebulous and (had) never been articulated, they (had nevertheless) 'acted to accomplish' the agency's plans"[9] these parents' failure since 1976 to "utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources" has been almost total and complete. Except for superficial cooperation with a nutritional aide and a public health nurse, the Santoskys have failed in any meaningful way to take advantage of the many social and rehabilitative services that have not only been made available to them but have been diligently urged upon them. Even Elizabeth Smith, Director of the Family Service Center of the Children's Home of Kingston, the witness who was previously most favorable

---

[9]This finding was found by the Appellate Division to be sufficiently supported by the record. "Considering the record as a whole, we are of the opinion that the respondents have substantially planned for the future of their children" (Matter of John W. and others, 63 AD2d 750).

to their cause, has been reluctantly forced to conclude because of their passivity and reluctance to participate in activities designed to help them,[10] particularly the Children's Enrichment Program, a program specifically designed to deal with the problems of parent-child relationships, that the return of any of the children to the Santoskys' in any foreseeable future should not be considered.

At no time can it be fairly said that these parents have ever "tak(en) such steps as may be necessary to provide an adequate, stable home and parental care for the child(ren) within a period of time which is reasonable under the financial circumstances available to (them)," (Social Services Law § 384-b subd. 7 (c)). Two of these children have been in foster care for more than four years and the third more than five. For all of this time the Santoskys have been the recipients of Social Services[11] and there is nothing in the situation which holds out any hope that they may ever become financially self sufficient or emotionally mature enough to be independent of the services of social agencies. More than a reasonable amount of time has passed and still, in the words of the case workers, there has been no discernible forward movement. At some point in time it must be said, "enough is enough".

---

[10]The four factors which to the witness provided contradiction to the return of the children to the Santosky home within the foreseeable future were:

> "1. The Santoskys' passivity in seeking and participating in activities intended to be helpful to them (In the main, I see them only if I am able to go to their home as they have made numerous excuses as to why they could not keep appointments at my office);
>
> 2. The Santoskys' restrictive parenting practices which inhibit normal development in their child;
>
> 3. The Santoskys' fears which preclude participation in activities outside their own family group.
>
> 4. The recent birth of a fifth child which adds to the demands made upon both Mr. and Mrs. Santosky."

[11]Since 1976 a total of $9,120 has been provided in public assistance and a total of $6,118.72 in other social and rehabilitative services.

Except for the plan[12] formulated by the Agency, and the Santoskys' superficial efforts to comply therewith, which have tapered off to the point where they are no longer measureable, there has never been any "plan" formulated by the parents, probably because they are simply incapable of doing so. However, even giving them credit for their miniscule efforts to comply with the Agency's plan through taking advantage of the social services offered to them is no longer enough to save them from the loss of their children, for the statute states that, "good faith effort shall not of itself, be determinative". (Social Services Law § 384–b, subd. 7(c)).

In short, the time has arrived when the court must acknowledge, no matter how tragic the result may be for these parents, that the Santosky are not now capable, and at any time in the foreseeable future, are probably incapable, despite all efforts to assist them of planning for the future of their children as that term is defined by law (Social Services, Law, § 384–b, subd. 7 (c)), in any meaningful way. I therefore conclude that the record in this case supports by a preponderance of the evidence a finding that there has indeed been a failure on the part of these parents to "plan for the future of (their children) although physically and financially able to do so" (F.C.A. § 614, subd. 1 (d); Matter of Orlando F., 40 N.Y. 2d 103).

The testimony of the petitioner's witness, Dr. Lenore M. Sportsman, Director of the Albany Child Guidance Center, and Exhibits No. 2–4 in evidence have not been considered in the determination of the Fact Finding phase of this proceeding (F.C.A. § 622, but will be considered in the Dispositional Hearing (F.C.A. § 623).

This matter will, therefore, be scheduled for a dispositional hearing "to determine what order of disposition shall be made in accordance with the best interests of these children" (F.C.A. § 623). The Clerk of the Court is directed to schedule such a dispositional hearing on notice to all interested parties.

---

[12] See Matter of Santosky, 89 Misc. 2d 730.

In the meantime, and until such a hearing can be held, the Commissioner's application for an extension of placement is granted and the children are continued in the care of the Commissioner of Social Services (F.C.A. § 1055).

Dated: March 12, 1979.

STATE OF NEW YORK
FAMILY COURT : ULSTER COUNTY

In the Matter of the Commitment of
Guardianship and Custody pursuant
to § 384-b of the Social Services Law
of TINA FRANCES APEL, JOHN SANTOSKY III,
and JED CONRAD SANTOSKY, cchldren under the age
of Eighteen years alleged to be Permanently
Neglected Children.

April 5, 1979

RICHARD W. CRIGGS, Attorney for
Commissioner of Social Services.

ALAN SUSSMAN (VICTORIA BLYTHE of Counsel),
Attorney for Respondent.

MARRIN & SMYTH (ROSEMARY SMYTH, of Counsel),
Attorneys for Foster Parents.

JAY SAMOFF, Law Guardian.

HUGH R. ELWYN, J: The Court has previously found that the allegations required by paragraphs (a), (b), (c) and (d) of section six hundred fourteen of the Family Court Act were supported by a fair preponderance of the evidence (F.C.A. 622).

After a dispositional hearing held on April 5, 1979 the Court now finds that the best interests of all three of the Santosky children require that their parents' custody be terminated permanently (F.C.A. § 623) and that their guardianship and custody be committed to the petitioner, the Commissioner of Social Services of Ulster County (F.C.A. § 631, subd (c). The petitioner's witnesses, Daniel Lucy and Lynn Davis, the social workers in charge of the Santosky case, and the petitioner's two expert witnesses, Dr. Lenore M. Sportsman, Director of the Albany Child Guidance Center and Elizabeth Smith, Director of the Fam-

ily Service Center of the Children's Home of Kingston were unanimous and firm in their opinion that the children's best interests required that the parents' right to their custody be permanently terminated and that a permanent and stable home environment be sought for each child through the medium of adoption. No evidence to the contrary has been presented on behalf of the respondents.

The court notes, however, that Dr. Lenore Sportsman expressed the opinion that the children John and Tina could be expected to continue to have psychological difficulties in adjusting to any home situation and that she therefore strongly recommended and, in fact, considered it essential that any set of adoptive parents should be receptive, amenable and cooperative with efforts to provide them with such professional counseling, whether in the form of psychiatric, psychological, or family counseling services as might be offered to them.

Accordingly, the Court directs the entry of order pursuant to section 687 of the Family Court Act committing the guardianship and custody of Tina Frances Apel, John Santosky II and Jed Conrad Santosky to the Commissioner of Social Services of Ulster County, but will attach to the order of commitment the condition that Commissioner provide supportive help to each child and their respective foster parents in the form of such professional psychiatric, psychological and family counseling services, as in the judgment of his professional advisers may be required to best promote the adjustment of child and foster parents, or adoptive parents, to a healthy and permanent relationship.

The Clerk will prepare and submit an appropriate order.

Dated: April 10, 1979.

FAMILY COURT—ULSTER COUNTRY

At a Term of the Family Court of the State of New York, held in and for the County of ULSTER at KINGSTON, New York on April 5, 1979

Docket No. B–3–78

PRESENT: Hon. HUGH R. ELWYN
Judge

In the Matter of
TINA FRANCES APEL

A Child under the Age of Eighteen Years,
Alleged to be a Permanently Neglected Child.

ORDER OF DISPOSITION

A Petition under Article 6, Part 1 of the Family Court Act having been filed in this Court alleging that Tina Frances Apel is a permanently neglected child; and summons having been issued and duly served upon Johnnie and Annie Santosky the parent(s) of said child; and

The matter having duly come on for an adjudicatory hearing; and the said parent(s) having appeared thereon; and this Court, after hearing the proofs and the testimony offered in relation to the case, having found that the allegations of the petition herein required by paragraphs (a),(b),(c) and (d) of Section 614 of the Family Court are supported by a fair preponderance of the evidence; and

The matter having duly come on for a dispositional hearing; and the said parent(s) having appeared thereon; and this Court having made examination and inquiry into the facts and circumstances of the case and into the surroundings, conditions and capacities of the persons involved in this proceeding; now, therefore, is

ADJUDGED that Tina Frances Apel is a permanently neglected child as defined by Article 6, Part 1 of the Family Court Act; and

*IT APPEARING that the moral and temporal interests of the child require that the parent'(s') custody of the child be terminated permanently, it is

*ORDERED that the custody of Tina Frances Apel the parent(s) of said child, over said child be and the same hereby is terminated permanently; and it is further

*ORDERED that the custody of said child be and the same hereby is awarded to Ulster County Commissioner of Social Services the Petitioner herein upon the following terms and conditions: that the Commisioner provide supportive help to the child and foster parents in the form of such professional psychiatric, psychological and family counseling services, as in the judgment of his professional advisors may be required to best promote the adjustment of child and foster parents or adoptive parents to a healthy and permanent relationship.

ENTER,

/s/ _____

HUGH R. ELWYN

*These provisions are eliminated if judgment is suspended.

FAMILY COURT—ULSTER COUNTY

At a Term of the Family Court of the State of New York, held in and for the County of ULSTER at KINGSTON, New York on April 5, 1979

Docket No. B–4–78

PRESENT: Hon. HUGH R. ELWYN
Judge

In the Matter of
JOHN SANTOSKY III

A Child under the Age of Eighteen Years,
Alleged to be a Permanently Neglected Child.

ORDER OF DISPOSITION

A Petition under Article 6, Part 1 of the Family Court Act having been filed in this Court alleging that John Santosky III is a permanently neglected child; and summons having been issued and duly served upon Johnnie and Annie Santosky the parent(s) of said child; and

The matter having duly come on for an adjudicatory hearing; and the said parent(s) having appeared hereon; and this Court, after hearing the proofs and the testimony offered in relation to the case, having found that the allegations of the petition herein required by paragraphs (a), (b), (c) and (d) of Section 614 of the Family Court Act are supported by a fair preponderance of the evidence; and

The matter having duly come on for a dispositional hearing; and the said parent(s) having appeared hereon; and this Court having made examination and inquiry into the facts and circumstances of the case and into the surroundings, conditions and capacities of the persons involved in this proceeding; now, therefore it is

ADJUDGED that John Santosky III is a permanently neglected child as defined by Article 6, Part 1 of the Family Court Act; and

*IT APPEARING that the moral and temporal interests of the child require that the parent'(s') custody of the child be terminated permanently, it is

*ORDERED that the custody of John Santosky III the parent(s) of said child, over said child be and the same hereby is terminated permanently; and it is further

*ORDERED that the custody of said child be and the same hereby is awarded to Ulster County Commissioner of Social Services the Petitioner herein upon the following terms and conditions: that the Commissioner provide supportive help to the child and foster parents in the form of such professional psychiatric, psychological and family counseling services, as in the judgment of his professional advisors may be required to best promote the adjustment of child and foster parents or adoptive parents to a healthy and permanent relationship.

ENTER,

/s/ _____

HUGH R. ELWYN

*These provisions are eliminated if judgment is suspended.

FAMILY COURT—ULSTER COUNTY

At a Term of the Family Court of the State of New York, held in and for the County of ULSTER at KINGSTON, New York on April 5, 1979

Docket No. B–5–78

PRESENT: Hon. HUGH R. ELWYN
Judge

In the Matter of
JED CONRAD SANTOSKY

A Child under the Age of Eighteen Years,
Alleged to be a Permanently Neglected Child.

ORDER OF DISPOSITION

A Petition under Article 6, Part 1 of the Family Court Act having been filed in this Court alleging that Jed Conrad Santosky is a permanently neglected child; and summons having been issued and duly served upon Johnnie and Annie Santosky the parent(s) of said child; and

The matter having duly come on for an adjudicatory hearing; and the said parent(s) having appeared thereon; and this Court, after hearing the proofs and the testimony offered in relation to the case, having found that the allegations of the petition herein required by paragraphs (a), (b), (c) and (d) of Section 614 of the Family Court Act are supported by a fair preponderance of the evidence; and

The matter having duly come on for a dispositional hearing; and the said parent(s) having appeared thereon; and this Court having made examination and inquiry into the facts and circumstances of the case and into the surroundings, conditions and capacities of the persons involved in this proceeding; now, therefore, it is

ADJUDGED that Jed Conrad Santosky is a permanently neglected child as defined by Article 6, Part 1 of the Family Court Act; and

*IT APPEARING that the moral and temporal interests of the child require that the parent'(s') custody of the child be terminated permanently, it is

*ORDERED that the custody of Jed Conrad Santosky the parent(s) of said child, over said child be and the same hereby is terminated permanently; and it is further

*ORDERED that the custody of said child be and the same hereby is awarded to Ulster County Commisioner of Social Services the Petitioner herein upon the following terms and conditions: that the Commisioner provide supportive help to the child and foster parents in the form of such professional psychiatric, psychological and family counseling services, as in the judgment of his professional advisors may be required to best promote the adjustment of child and foster parents or adoptive parents to a healthy and permanent relationship.

ENTER,

/s/ _____

HUGH R. ELWYN

*These provisions are eliminated if judgment is suspended.

STATE OF NEW YORK
FAMILY COURT: ULSTER COUNTY

B–3–78
B–4–78
B–5–78

In the matter of

JOHN SANTOSKY III,
JED SANTOSKY
TINA FRANCES APEL,

Children Under the Age of Eighteen Years Alleged to be Permanently Neglected Children.

NOTICE OF APPEAL

PLEASE TAKE NOTICE, that, pursuant to the provisions of section 5601 (b) of the Civil Practice Law and Rules, the above-named respondent relying solely upon the constitutional question involving the validity of Section 622 of the Family Court Act of New York, under the provisions of Section 6, Article 1, of the Constitution of the State of New York and of Amendment Fourteenth of the Constitution of the United State, hereby appeals as of right to the Court of Appeals of the State of New York, from the final judgment herein, dated the 5th day of April 1979, adjudging the subject children of this proceeding to be permanently neglected, by order of Hon. Hugh R. Elwyn, Justice of the Family Court on the 5th day of April, 1979, and entered in the office of the clerk of the Ulster County Family Court on the 5th day of April, 1979, and from each and every part of the said judgment and order and from the whole thereof.

Dated: April 24, 1979

RICKEN, GOLDMAN, SUSSMAN & BLYTHE
Attorneys for Respondents
14 Pearl Street
Kingston, New York 12401
Tel. No. (914) 339-3050

TO: RICHARD W. GRIGGS, ESQ.
Attorney for Petitioner
243 Fair Street
Kingston, New York 12401

FAMILY COURT—ULSTER COUNTY

At a Special Term of the Family Court of the State of New York, held in and for the County of Ulster at 240 Fair Street, Kingston, New York, on the 8th day of May, 1979

Docket Nos.
B-3-4-5-78

PRESENT: HON. HUGH R. ELWYN,
Justice.

In the Matter of the Commitment of Guardianship and Custody pursuant to Section 384-b of the Social Services Law of TINA FRANCES APEL, JOHN SANTOSKY III, and JED SANTOSKY, children under the age of Eighteen Years alleged to be Permanently Neglected Children.

ORDER

UPON the Order of this Court dated April 26, 1979, ordering petitioner to show cause why the Order of this Court dated April 5, 1979, finding the infant children of this proceeding to be permanently neglected children should not be stayed; and

UPON the affidavit of Alan N. Sussman, Esq., attorney for the respondents, dated April 24, 1979, in support of the stay and upon the answering affidavits of Jay Samoff, Esq., Law Guardian, dated May 3, 1979, and Wilfrid E. Marrin, Esq., attorney for the foster parents, dated May 3, 1979

and Richard W. Griggs, Esq., attorney for petitioner, dated May 10, 1979, all in opposition thereto; and

UPON hearing counsel for respondents, counsel for foster parents and the law guardian before me in open court on the 8th day of May, 1979, and due deliberation having been had, and a decision having been written on the 8th day of May, 1979, it is hereby

ORDERED, that all proceedings to enforce the order of this Court dated April 5, 1979, including the authority of petitioner to consent to an adoption of the children herein, are hereby stayed; and it is further

ORDERED, that the stay granted herein is conditioned upon respondents perfecting their appeal to the Court of Appeals, within 60 days of filing the Notice of Appeal; and it is further

ORDERED, that questions or issues of visitation of the within children with respondents shall reside within the discretion of the petitioner, in whose custody the children remain.

/s/ _____

HUGH R. ELWYN
J.F.C.

Entered: Kingston, New York
May 18, 1979

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourteenth day of June A.D. 1979

Present, HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

Mo. No. 614 SSD 51

In the Matter of JOHN S. (Anonymous) III, JED S. (Anonymous) and TINA FRANCES A. (Anonymous), Children Under the Age of Eighteen Years Alleged to be Permanently Neglected Children.

John and Ann S. (Anonymous), Appellants.

The appellants having filed a notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is transferred by the Court *sua sponte* to the Appellate Division, Third Department, without costs, upon the ground that a direct appeal does not lie where questions other than the constitutional validity of a statutory provision are involved (N.Y. Const., Art. VI, § 3[b] [2], § 5[b]; CPLR 5601[b] [2]).

/s/ _____
DONALD M. SHERAW
Deputy Clerk of the Court

SUPREME COURT—APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

May 1, 1980 36228

In the Matter of JOHN "AA"* et al., Children Alleged to be Permanently Neglected.

BERNHARDT S. KRAMER, as Commissioner, Ulster County Department of Social Services, RESPONDENT,

v.

JOHN "AA"* ET AL., APPELLANTS.

Appeal from a judgment of the Family Court of Ulster County (Elwyn, J.), entered April 5, 1979, which adjudged appellants' three children to be permanently neglected pursuant to article 6 of the Family Court Act.

The sole contention upon this appeal is that section 622 of the Family Court Act is unconstitutional because the standard of proof required by the statute, a fair preponderance of the evidence, is so low that it deprives them of due process of law. In *Matter of Anthony L. "CC"* (48 A D 2d 415, 419), this court held that the level of proof required by section 622 was constitutional. In adhering to our decision, we note that the permanent neglect statute (Social Services Law, § 384-b; Family Ct. Act. § 611, *et seq.*) recognizes and seeks to balance rights possessed by the child (see Social Services Law, § 384-b, subd. 1; *Matter of Bennett* v. *Jeffreys*, 40 N Y 2d 543, 547) with those of the natural parents (see Social Services Law, § 384-b, subd. 1; *Matter of Sanjivini K.*, 47 N Y 2d 374, 382; *Matter of Corey L* v. *Martin L*, 45 N Y 2d 383, 392). Accordingly, application of the preponderance of evidence standard in such a proceeding involving these often conflicting rights is proper and constitutional.

Judgment affirmed, without costs.

MAHONEY, P. J., GREENBLOTT, KANE, MAIN and MIKOLL, JJ., concur.

---

*Fictitious name.

SUPREME COURT—APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

AT a Term of the Appellate Division of the Supreme Court of the State of New York in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York, commencing on the 17th day of March, 1980.

PRESENT:

HON. A. FRANKLIN MAHONEY,
Presiding Justice,
HON. LOUIS M. GREENBLOTT,
HON. T. PAUL KANE,
HON. ROBERT G. MAIN,
HON. ANN T. MIKOLL,
Associate Justices.

In the Matter of TINA FRANCES APEL, JOHN SANTOSKY III and JED CONRAD SANTOSKY, children under the age of eighteen years alleged to be Permanently Neglected Children.

BERNHARDT S. KRAMER, Commissioner, Ulster County Department of Social Services,
PETITIONER-RESPONDENT.

JOHN SANTOSKY II and ANNIE SANTOSKY,
RESPONDENTS-APPELLANTS.

ORDER
36228

The appellants having appealed from a judgment of the Family Court of Ulster County (ELWYN, J.), entered April 5, 1979, which adjudged appellants' three children to be permanently neglected pursuant to article 6 of the Family Court Act, and said matter having been presented during the above-stated Term of this Court, and after due deliberation the Court having rendered a decision on May 1, 1980, it is hereby

ORDERED that the judgment appealed from be affirmed, without costs.

ENTER:

/s/
JOHN J. O'BRIEN
Clerk

DATED AND ENTERED: May 7, 1980

A TRUE COPY

/s/
JOHN J. O'BRIEN
Clerk

FAMILY COURT—ULSTER COUNTY
STATE OF NEW YORK

In the Matter of John "AA" et al., Children Alleged to be Permanently Neglected,

JOHN "AA" ET AL.,
RESPONDENTS-APPELLANTS,

-against-

BERNHARDT S. KRAMER, as Commissioner,
Ulster County Department of Social Services,
PETITIONER-RESPONDENT.

NOTICE OF APPEAL

SIRS:

PLEASE TAKE NOTICE that the Respondents-Appellants, relying solely upon the question directly involving the provisions of the Fourteenth Amendment of the Constitution of the United States and the constitutionality of New York Family Court Act, Section 622, appeal as of right to the Court of Appeals of the State of New York from a final Order of the Appellate Division, Third Department, entered in the Office of the Clerk of the Appellate Division, on May 7, 1980 and served upon Respondent May 9, 1980, which unanimously affirmed the judgment of the Family Court of Ulster County, in favor of the Petitioner-Respondent, entered in the Office of the Clerk of the County of Ulster on April 5, 1979 and Respondents-Appellants appeal from each and every part of the Order of the Appellate Division and from the whole thereof.

Dated: May 20, 1980.

Yours, etc.,

RICKEN, GOLDMAN, SUSSMAN & BLYTHE
Attorneys for Appellants
185 Fair Street
Kingston, New York 12401

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of September A.D. 1980

Present, HON LAWRENCE H. COOKE, *Chief Judge, presiding.*

Mo. No. 797

In the Matter of TINA FRANCES APEL, JOHN SANTOSKY III and JED CONRAD SANTOSKY, children &c. Alleged to be Permanently Neglected Children.

BERNHARDT S. KRAMER, Commissioner, Ulster County Department of Social Services,
RESPONDENT,

JOHN SANTOSKY II and ANNIE SANTOSKY,
APPELLANTS.

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellants in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

/s/ _____
JOSEPH W. BELLACOSA
Clerk of the Court

SUPREME COURT OF THE UNITED STATES

No. 80-5889

JOHN SANTOSKY II and ANNIE SANTOSKY, PETITIONERS

v.

BERNARDT S. KRAMER, COMMISSIONER, Ulster County Department of Social Services

ON PETITION FOR WRIT OF CERTIORARI TO THE Appellate Division, Supreme Court of New York, Third Judicial Department.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 23, 1981